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No. 79-735

IN THE

Supreme Court of the United States

October Term, 1979

SEARS, ROEBUCK AND CO.,
Petitioner,

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The opinions below, the basis of this Court's jurisdiction and the statutory and constitutional provisions involved are set out at pp. 1-3 and A1-A29 of the petition.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does this Court's prior decision in this case or the National Labor Relations Act require a state to empower its courts to issue injunctions against an alleged trespass on an employer's property during a labor dispute?

2. Does the Due Process clause of the Fourteenth Amendment require a state to so empower its courts?

STATEMENT OF THE CASE

This case concerns picketing by respondent Union during a labor dispute with petitioner Sears on a private walkway open to the general public at the entrance to a Sears store. The resulting legal controversy grows out of Sears attempt to secure a state court injunction under the state's trespass law. Initially the California Supreme Court reversed such an injunction entered by a California Superior Court on the ground that "state jurisdiction was pre-empted under the [*San Diego Unions* v.] *Garmon* [359 U.S. 236] guide lines." (*Sears, Roebuck & Co.* v. *Carpenters*) 436 U.S. 180, 184 (*Sears I*).)

Sears then brought the matter to this Court arguing that "the protection of private property from trespass is an interest deeply rooted in local feeling and responsibility" (Brief for Sears, Roebuck and Co. in No. 76-750, Oct. Term, 1976, p. 8; heading, first letter capitals omitted) and therefore within the exception to the basic *Garmon* rule stated in 359 U.S. at 244. The respondent Union replied, *inter alia*, it appeared that under the California Code of Civil Procedure, § 527.3 (the Moscone Act), the "California courts may not enjoin [labor] picketing as long as it is peaceful and not disruptive" (Brief for Respondent in No. 76-750, Oct. Term, 1976, p. 16), that the California Supreme Court had not passed on that or related state law questions (*id.* at 8-18), and that a "remand * * * for a determination as to whether the injunction issued here is proper under state law" would be in order (*id.* at 37). In its reply brief in *Sears I.*, petitioner disputed the Union's reading at § 527.3 but did not even suggest that Federal law requires the states to issue such injunctions. To have done so would. of course, have compromised its reliance

on the "deeply rooted in local feeling and responsibility" exception to *Garmon*. In its *Sears I* decision this Court, noting that the Union's state law arguments were not affected (436 U.S. at 185, n. 8), concluded that at least where a union does not seek through a charge filed with the National Labor Relations Board to establish that its picketing is protected by the National Labor Relations Act; *Garmon* does not oust the state courts of jurisdiction to enforce state trespass law (*id.* at 199-208), and "remanded * * * for further proceedings not inconsistant with [the] opinion," (*id.* at 208).

On remand, the California Supreme Court held that under the Moscone Act, whose "purpose [is] the elimination of unnecessary judicial intervention into labor disputes" (Pet. App. A15-A16), "[p]eaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the [California] courts" (*id.* at A16-A17). That court's judgment accordingly reversed the injunction order against the Union. (See Pet. App. A25.)

Petitioner now returns to this Court to urge that *Sears I* and the NLRA *require* the state to issue that injunction.

ARGUMENT

I *Petitioner's NLRA Preemption Claim Is Insubstantial.*

In urging that the decision below is violative of the National Labor Relations Act (NLRA) petitioner does not invoke the exclusive primary jurisdiction of the National Labor Relations Board under cases such as *San Diego Unions* v. *Garmon*, 359 U.S. 236. For it is not petitioner's position that the state courts of California were without juris-

diction over this litigation. On the contrary, petitioner *invoked* that jurisdiction by seeking and obtaining a preliminary injunction against the Union's picketing. And in *Sears Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 *(Sears I)* petitioner successfully urged this Court to hold, contrary to the decision of the California Supreme Court, that the NLRA does *not* oust the state courts of jurisdiction.

Thus, petitioner's claim under the NLRA, such as it is, invokes the principle "that there is 'conduct which a State may not prohibit even though it is not covered by § 7 of the [Labor] Act. *Sears*, 436 U.S. at 199, n. 30 * * *'" (Pet. 3). But that "line of analysis" *(id)*, never raised below [1], is, on its face, not applicable here since the California Supreme Court did *not* "prohibit" any conduct by petitioner Sears. Of the perhaps dozens of cases in this Court which have dealt with various facets of the relationship between the NLRA and state law, there is not one which has held that a

[1] Petitioner did not present this argument to the California Supreme Court. Rather, the "preemption" contention below was premised on the notion that under *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, Sears' use of its no-solicitation rule was "federally *protected*" (Respondent's Supplemental Brief, California Supreme Court No. LA 30562 ("Resp. Supp. Br.") at 14-15 (emphasis supplied)). Based on this erroneous premise, Sears asserted (*id.* at 15) that:

> "In these circumstances, due regard for the federal enactment requires that state jurisdiction must yield *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). The animating force behind the doctrine of labor law preemption has been the recognition that nothing could more fully serve to defeat the purposes of the [Labor] Act than to permit state and federal courts, without any limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board (*Sears* v. *San Diego Carpenters*, 98 S.Ct. at 1768 (Brennan, J., dissenting)).

Thus, the argument below relied upon the very *Garmon* issue

state court is required to issue an injunction in a labor dispute or to award damages for tortious conduct in such a dispute. The reason is obvious: the duties created by the NLRA are enforcible only by the NLRB. Thus, while the state courts are, of course, forbidden by the Supremacy Clause from interfering with the exercise of any rights granted by the NLRA (as *Machinists* v. *Wisconsin Emp. Rel. Comm'n* 427 U.S. 132, for example, holds), the NLRA is not one of those statutes (such as, for example, the Federal Employers Liability Act) [2] in which Congress has mandated the State courts to provide a remedy for the violation of Federal rights.[3]

It is, of course, true "that in certain situations notwithstanding that the conduct involved is neither protected nor prohibited by the Labor Act, 'the exercise of state authority' would, nevertheless, 'frustrate effective implementation of the policies' of that Act." (Pet. 5 quoting *New York Tel. Co.* v. *New York Labor Dept.*, 440 U.S. 519, 531 (opinion of Stevens J.). See also *Machinists, supra; Teamsters Union* v. *Morton*, 377 U.S. 252.) But that principle adds

which petitioner now recognizes (Pet. 4-5) was foreclosed—in accord with petitioner's position at the time—by this Court's earlier decision in this case.

[2] *See Second Employers Liability Act Cases*, 223 U.S. 1; cf. *Testa* v. *Katt*, 330 U.S. 386 (§ 205 of the Emergency Price Control Act, 56 Stat. 32).

[3] While the state courts have jurisdiction, concurrent with the federal courts, to vindicate rights under § 301(a) of the Labor-Management Relations Act of 1947 (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *Humphrey* v. *Moore*, 375 U.S. 335) it has not been decided whether the state courts *must* exercise that jurisdiction. Since petitioner, despite its inapposite reference to "bargaining relationships" (Pet. 7), has not invoked § 301(a) there is no occasion to consider that question here.

nothing of substance to the petition. The claim here does not concern "the exercise of state authority"; the objection is that the state has, as a matter of state law, *refused* to exercise its authority to authorize its courts to issue certain injunctions. The assertions that "California here has directly sought to impose its own substantive regulation of labor-management relations" (Pet. 6), and that therefore this case presents the "question of whether this deliberate state regulation of bargaining relationships is a permissible intrusion upon the national labor policy" (Pet. 7), simply mistake the operative effect of the judgment below which is only to *withhold* state regulation on behalf of either party.

To be sure, petitioner urges that the California Supreme Court's opinion construes the Moscone Act as declaring that "the picketing was 'lawful' and the employer has no * * * right * * * of self-help." (Pet 6.) But as was observed in dismissing as improvidently granted the writ of certiorari to that Court in *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297: "This Court, however, reviews judgments, not statements in opinions. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126, *Morrison* v. *Watson,* 154 U.S. 111, 115. See also *Williams* v. *Norris,* 12 Wheat. 117, 118, 120."

Moreover, while petitioner asserts that the NLRA grants employers a "right" of self help to expel union pickets, it is unable to point to any provision of that Act stating that right. Sears merely argues that the decision below "calls into question the validity under state law of federally permissible no-solicitation rules against non-employee activity on private property." (Pet. 9, citing *Labor Board* v. *Babcock & Wilcox,* 351 U.S. 105, 112-113.) But that case and its progeny hold that such rules are "permissible" only in the sense that they are not forbidden by the NLRA. The

"burden imposed on a union to justify access on private property" (Pet. 8) is simply a condition for a union to obtain protection under the NLRA, as is made clear in *Sears I,* 436 U.S. at 205, to which petitioner refers. Indeed, this Court, in rejecting the proposition that because the picketing herein was arguably an unfair labor practice the NLRB's jurisdiction is exclusively, stressed that the NLRA does not declare trespass as such to be an unfair labor practice.[4]

II. *Petitioner's Constitutional Claims Are Insubstantial*

Petitioner asserts that the constitutional issue raised here is the same as that in *Prune Yard Shopping Center* v. *Robins,* No. 79-289, which this Court has set for plenary consideration, and that a grant of certiorari in this case would be "desirable." (Pet. 8.) But Sears does not explain how consideration of the present case would further the Court's deliberations concerning that constitutional issue, and why this Court should not, as it more usually does with related cases, hold the present petition for disposition in

[4] The *Sears I* Court stated:

> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. [436 U.S. at 198; footnote omitted.]

light of the outcome in *Prune Yard*. Nevertheless, if the issues were indeed "necessarily identical" (Pet. 8) we would not press our opposition to the grant of certiorari with respect to the constitutional issue here (although that "identity" could not possibly justify a grant on the pre-emption issue, which is wholly insubstantial.) But this case is unlike *Prune Yard*, and petitioner's case is weaker, in two significant respects.

First, the judgment below rests on two independent state policies, of which only one, that based on the California State Constitution, underlies the judgment in *Prune Yard*. The other is the policy of § 527.3: "the elimination of unnecessary judicial intervention into labor disputes" (Pet. App. 15A-16A). The proposition that the Due Process Clause of the Fourteenth Amendment forbids the states from implementing such a policy is, we submit, of insufficient merit and importance to warrant this Court's attention.

The other distinction between this case and *Prune Yard* is even more critical, and is due to the different nature of the two proceedings and of the resulting judgments of the California Supreme Court. *Prune Yard* is an action brought by the persons who wish to communicate on the property of another seeking an order declaring that they are entitled to do so and may not be removed; the judgment under review in *Prune Yard* grants that relief. The present action, however, is one by the owner of property for an *injunction* against communication on its property, and the judgment below merely denies petitioner that relief.

It is for this reason that question 4 (Pet. 2) which has no equivalent in Prune Yard is indispensable to Sears' petition. And since "this Court reviews judgments and not statements in opinions" (*Black* v. *Cutter Laboratories*, *supra*), that question is more accurately phrased "whether the Due Process Clause of the Fourteenth Amendment requires the state to empower its courts to issue *an injunction* against the union?" Petitioner's citation of *Truax* v. *Corrigan*, 257 U.S. 312 as authority for the existence of such a constitutional right (Pet. 10) carries its own death wound. As Mr. Justice Frankfurter wrote for the Court in *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284, 287-288:

> The series of cases concerning the use of the injunction in labor controversies begins with *Truax* v. *Corrigan*, 257 U.S. 312, in which a closely divided Court found it to be violative of the Equal Protection Clause —not of the Due Process Clause—for a State to deny use of the injunction in the special class of cases arising out of labor conflicts. The considerations that underlay that case soon had to yield, through legislation and later through litigation, to the persuasiveness of undermining facts. Thus, to remedy the abusive use of the injunction in the federal courts, see Frankfurter and Greene, The Labor Injunction, the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, withdrew, subject to qualifications, jurisdiction from the federal courts to issue injunctions in labor disputes to prohibit certain acts. Its example was widely followed by state enactments.

We need add only two brief observations:

a) Petitioner did not assert either in the court below, or in its petition for certiorari, that it has been denied the equal protection of the laws under the Fourteenth Amend-

ment.[5] Thus, *Truax* would not support Sears' claim that it is constitutionally entitled to an injunction even if it were still good law.

b) But of course, as the *Vogt* opinion shows, *Truax* is not good law. *Senn* v. *Tile Layers*, 301 U.S. 468 not only limited *Truax* to its particular facts but signalled that "the current [of constitutional decision was] running strongly in the new direction—the direction not of social dogma but of increased deference to the legislative judgment."[6] Sears' attempt to reverse the tide does not merit this Court's consideration. For Sears cannot possibly surmount "the difficulty of requiring a state court to issue an injunction that it never has been empowered to issue by the quasi sovereign that created the court." (*Truax* 257 U.S. at 344 (Holmes, J. dissenting).)

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[5] The sentence from *Truax*, 257 U.S. at 330, which is partially quoted at Pet. 10 dealt with the case on the assumption that the state had deprived the employer of all remedies. As noted in *Vogt*, 354 U.S. at the question of the denial of "only the equitable relief of injunction"—which alone is present on this record—was treated in *Truax* as analytically distinct, and as raising only an "equal protection" issue. (See 257 U.S. at 330 *et seq.*)

[6] This is Mr. Justice Frankfurter's characterization of *Senn* in his concurring opinion in *A. F. of L.* v. *American Sash Co.*, 335 U.S. 538, 544. In that opinion Justice Frankfurter said also (*id.* at 543-544):

> The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earner's bargaining power. With that attitude as a premise, *Adair* v. *United States*, 208 U.S. 161, and *Coppage* v. *Kansas*, 236 U.S. 1, followed logically enough; not even *Truax* v. *Corrigan*, 257 U.S. at 312, could be considered unexpected.

CONCLUSION

For the above stated reason the petition for a writ of certiorari should be denied.

Respectfully submitted,

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